

Dipak Banerjee Vs. Sudipta Banerjee

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Court : Kolkata

Decided On : Jul-23-1987

Reported in : (1987)0CALLT491(HC),92CWN352

Judge : Mukul Gopal Mukherjee, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125 and 126;
;Municipal Law

Appeal No. : Crl. Rev. 2186 of 1986

Appellant : Dipak Banerjee

Respondent : Sudipta Banerjee

Advocate for Def. : Sudhir Bose, ;Bhattacharjee and ;Dipak Pal, Advs.

Advocate for Pet/Ap. : Party-in-person

Judgement :

Mukul Gopal Mukherjee, J.

1. This is a revisional petition filed by the husband Dipak Banerjee, a B. E. Mechanical Engineering from Calcutta and a M. S. from New York and a computer professional who claims himself to be a citizen of United States of America, with his domicile in the States of Colorado having spent 10 years 10 months in different

States there impugning an order dated June 22, 1985 passed by the learned Sub-Divisional Judicial Magistrate, Alipore whereby the latter found the Court having jurisdiction to entertain and try a proceeding under Section 125 of the Code of Criminal Procedure brought by the petitioner's wife Sm. Sudipta Banerjee for maintenance of herself and their only minor daughter, Sangeeta. This proceeding for maintenance was filed on June 27, 1984. The learned Magistrate overruled the petitioner preliminary objection questioning the jurisdiction of any Judicial Magistrate. Court in India in an international sense to try a claim for maintenance brought by his wife. The petitioner contends that his wife also retains the domicile of her husband and private international law brings in the conflict of laws supervening the field of operation of this proceeding.

2. Unfortunately the petitioner has not laid any oral evidence in the Trial Court in support of his contentions but he wanted to produce certain documents like passport, visa, nationalisation certificate, etc., in this Court to prove acquisition of his u/s. citizenship. It is an admitted position that the husband and wife had lived together and had their matrimonial home in the United States of America between July 1972 and May 1978 where they presented a petition for divorce by mutual consent but did not see through the proceedings, the wife having left for her parents in India and the proceeding was ultimately withdrawn in 1979 through the wife's solicitors in U.S.A.

3. The marriage was solemnized at 186 Rash Behari Avenue, P.S. Tallyganj on May 30, 1970 according to Hindu rites and a female child was born to them on February 21, 1972 at Sindri where the petitioner's father-in-law resided. In July 1972 the petitioner took his wife and daughter to U.S.A. and he came back to India with them on 13.5.1978. The petitioner thereafter alone went back to U.S.A. on May 28, 1978 and ultimately after resigning his job in U.S.A. he came back to India on June 6, 1979 and since then he is living in his father's house at 40A Kalicharan Ghosh Road in the suburbs of Calcutta. On May 4, 1981 the wife and the child left the petitioner's father's house and went to live with her parent at 162/C/535 Lake Gardens, Calcutta-45. She filed on May 16, 1981 a petition for divorce in the District Judge's Court at Alipore, 24 Parganas being Matrimonial Suit No. 309 of 1981 which was remembered as 20 of 1984 before the 7th Court of the Additional

District Judge's Court, on ground of cruelty and desertion under Section 13 of the Hindu Marriage Act 1985. The petitioner raised a preliminary question of jurisdiction in the said proceeding contending that he had U. S. domicile and no suit could lie against him in India and by an order dated 12.3.1985, learned Additional District Judge, 7th Court, Alipore held inter alia that both the parties were of Indian domicile and his findings on domicile of the parties were not necessary to decide the issue on the jurisdiction of the said matrimonial Court and that the said Court had jurisdiction to try the suit. There was an order for payment of maintenance for the daughter in the said Matrimonial Suit @ Rs. 250 per month but it is an admitted position that the husband petitioner did not honour his commitments in this respect after he paid such maintenance for some time. As stated earlier the proceeding under Section 125 of the Code of Criminal Procedure for maintenance of the wife and child was filed by the opposite party Sudipta on June 27, 1984 when more than one year elapsed after the husband stopped sending any maintenance for the child.

4. Various pleas were taken by the husband petitioner before the Court below questioning its very jurisdiction to entertain and try the proceeding for maintenance under Section 125 of the Code of Criminal Procedure, mainly on the ground inter alia that no learned Magistrate's Court in India had jurisdiction in an international sense to entertain and try such a proceeding. He cited very many case laws pertaining to private international law and urged the learned Magistrate to reject the application for maintenance in limine on the ground of lack of jurisdiction. The learned Magistrate rightly held in the facts of the case that the forum to ventilate the wife's claim for maintenance against the husband who neglected her and refused to maintain her and the child born of the wedlock would be a Court within whose jurisdiction she ordinarily resides. Following the decision reported in : 1975 CriLJ52 Sm. Satya v. Teja Singh the learned Magistrate rightly held that under Section 126 of the Code of Criminal Procedure, the wife could take the proceeding before the Court of the learned Magistrate, since the said Court was situated within the District, where she resides. Furthermore the learned Magistrate found the proceeding otherwise maintainable in law.

5. In support of his contention the petitioner has taken me through Cheshire's book on Private International Law, which he cited as good law in so far English Courts are concerned. On the analogy of the English Principles he stressed the rejection of the proceeding impugned on the ground inter alia that since he retained his U. S. domicile, the appropriate Court for the wife to file a claim for maintenance or for other ancillary reliefs in a matrimonial Court, would be a Court in the State of Colorado in U.S.A. where he last resided with his wife, oblivious of the fact that he came and lived with his wife in his father's house at 40A Kalicharan Ghosh Road in the northern suburb of Calcutta, which is very much in the district of 24-Parganas till his wife along with the child went away to her father's Lake Garden house (also in the southern suburb of Calcutta in district of 24 Parganas) on May 4, 1981. Furthermore the law in England has also undergone a change and bereft of the foreign domicile of her husband, a wife in England who resides in England, can file such proceeding not only for divorce but also for maintenance before an English Court and she need not have to run to the foreign land for appropriate reliefs against her husband.

6. I have considered the following decisions cited by the husband-petitioner in support of the contention noted against each of them is given out hereinbelow :

(1) A.I.R. 1935 Bombay 5 at page 12 (Muncherji Curestji Khambata v. Jessise Grant Khambata) that in the realm of private international law (i) the forms necessary to constitute a valid marriage and the construction of the marriage contract depend on the *lex loci contractus*, (ii) on marriage the wife automatically acquires the domicile of her husband. (iii) the status of the spouses and their rights and obligations arising under the marriage contract are governed by the *lex domicilli*, that is by the law of the country in which for the time being they are domiciled, (iv) the rights and obligations of the parties relating to the dissolution of the marriage do not form part of the marriage contract, but arise out of, and are incidental to, such contract and are governed by the *lex domicilli*. But though these propositions in themselves are not open to question, the application of them and even the meaning of them in some respects are not free from difficulty.

(2) : [1955]1SCR1215 (D.P. Joshi v. State of Madhya Bharat) to contend that domicile denotes connection with territorial system of law (paragraphs 5, 7, 8, 9, 10, 11 and 23) and further domicile of a legitimate minor is that of the father and further that citizenship and domicile represent two different concepts. Citizenship has reference to political status of a person and domicile relates to his civil rights. Classic statement on the subject was made with reference to observations of Lord Westbury in *Udny v. The Attorney General* (1869) LR1Sc & Div. 441 at 447.

(3) : AIR1969 Guj79 (Sk. Dawood Mahomed Pathan v. Union of India and Anr.) In this case concept of domicile was explained as to the essential content of the concept of domicile. It was given out with particular reference to Cheshire that domicile denotes the relation between a person and a particular territorial unit possessing its own system of law. Halsbury in *Laws of England* described it to the effect that a person's domicile is that country in which he either has or is deemed by law to have his permanent home. Domicile is generally identified with home, but whereas a person may have no home or more than one, law requires him to have a domicile and one only. In order to make it easy to work out the principles of domicile the law assigns what is called a domicile of origin to every person at his birth, viz., to a legitimate child the domicile of the father and to an illegitimate child the domicile of the mother and to a foundling place where he is found. This domicile of origin is attached to a person at the time of his birth by operation of law itself. This domicile of origin continues to attach itself to that person during the rest of his lifetime until and unless he has abandoned that domicile of origin by acquiring another domicile of his choice. A domicile of choice would be referable to domicile in some country other than the country in which there was his domicile of origin. In order to acquire a fresh domicile by choice, there should be proved actual residence by that person in the new country and also a present intention in that person's mind to make his permanent home in that country. By the term permanent home, it is not meant to be a home forever and for all times to come. What is meant is a home for an indefinite time. These principles relating to acquisition of domicile of origin and of choice are well settled (*vide Mrs. Roseta Evelyn Attaullah v. Jestin Attaullah* : AIR1953 Cal530 (SB), *Winas v. Attorney General* 1904 AC 287 *Kedar Pandey v. Narain Bikram Seh* : [1965]3SCR793 . Thus the petitioner contends that domicile denotes connection with territorial

system of law and domicile of a legitimate minor is that of his father.

(4) : 1973 CriLJ1 (Abdus Samed v. State of West Bengal) In this case also the basic principle of law propounded is that domicile denotes connection with territorial system of law. Every person must have a domicile. But a person cannot have two simultaneous domiciles. The burden of proving a change in domicile is on those who allege that a change has occurred. In this case the appellant had obtained Pakistani Passport and had applied under Section 5(1)(a) of the Citizenship Act 1955 for being registered as Indian citizen after service of notice to leave India which clearly indicated that his intention was not to live in India permanently and as such he did not have an Indian domicile. It was further held that the application for being registered as Indian citizen under Section 5 repelled the plea of Indian citizenship. The plea that since the appellant had come to India before 1948 he must be deemed to have domicile in India from Pakistan and had acquired Indian domicile could not be accepted in view of the Pakistani Passport and visa granted by the West Bengal Government and is repelled by the fact that his family and relatives were all in Pakistan.

(5) : (1984)ILLJ481SC (Dr. Pradeep Jain, etc. v. Union of India and Ors.) in this case also the proposition stressed was that domicile denotes connection with territorial system of law and rightly it was pointed out in this context that Constitution recognises only one domicile, viz., domicile in India. It would, therefore, be not right to say that a citizen of India is domiciled in one State or another, forming part of the Union of India. In this case in the context of effecting admissions to medical college the question arose whether the entry would be confined to place of the domicile or on the applicants having been found within the said area who are residents within the State for a specified number of years or on conditions of any reservation in admission being made to them so as to give them precedence over those who do not possess domicile or residential qualification within the State irrespective of merit. Their Lordships of the Supreme Court pointed out that Article 15(2) bars discrimination on grounds not only religion, race, caste or sex but also of place of birth. Article 16 goes further and provides that no citizen shall on grounds only of religion, race, caste, sex, descent place of birth, residence or any of them, be intelligible for or discriminated against in any State

employment. However, with this proposition there is no quarrel nor with the ultimate ratio decided therein that in matters of admission to M.B.B.S. and B.D.S. courses reservation on grounds of residential requirement within the State and institutional preference cannot exceed indeed be the sole criterion and wholesale reservation on aforesaid grounds would have violating Article 14.

(6) 1980 Maharashtra Law Journal Khorshed Behram Rustomjee v. Behram Nowrojee Rustomjee that was a case of Parsi Marriage and Divorce Act 1936. The husband filed a suit for divorce in Parsi Chief Matrimonial Court, Bombay and subsequently withdrew the suit and filed a Divorce Suit in High Court of London where he was a domicile. Decree for restitution of conjugal rights was granted to wife in the counter claim made by her in the suit at Bombay. In a petition for alimony and maintenance it was found that the English Court had no jurisdiction and the Bombay Court on the other hand had jurisdiction. Furthermore the husband had submitted to the jurisdiction of this Court when he filed his petition in 1978 and he was not entitled to raise objection at such a late stage and as such the Court had jurisdiction to pass necessary orders on the said petition as the said Court was alone competent under the Parsi Marriage and Divorce Act 1936 to pass such orders and not the English Matrimonial Court on the basis that the husband was never governed by the law of his English domicile.

(7) 57 C.W.N. page 778 Rosetta Evelyn Attaullah v. Justin Attaullah and Anr. In this case also it was decided inter alia that in determining the domicile of the parties in a proceeding for dissolution of marriage, it is the domicile of the husband which is to be considered because wife takes the domicile of her husband upon her marriage. That case however propounded the proposition that a man may change his domicile without divesting himself for nationality and there may be also a change of nationality without a change of domicile. However in the case of complete merger or recession of a State it is not open to a person who was a citizen of that State which is now nonexistent or was a domicile therein to continue to arrogate even after its disappearance either a citizenship or a domicile with reference to that quondam State.

6. In support of his contention that in accordance with the Private International Law the domicile of wife is that of her husband the petitioner relied on the following case laws apart from depending upon the Commentary on the Constitution of India by Dr. Durga Das Basu (Volume A) (Sixth Edition--1982) (Article 5) (Section on 'Domicile') (Page 196--'(3) Domicile may also be.....by remarriage.').

A.I.R. Commentaries on The Constitution of India by Mr. D.V. Chitaley and Mr. S. Appu Rao (Volume I) (2nd Edition--1970) (Article 5) (Section on 'Domicile') (Pages 552 and 553--'Note 4(i)--Domicile of Married Woman').

(i) A.I.R. 1931 Calcutta 383 (Special Bench) (Wright v. Wright) (Index note (b) and page 384--Right hand column--1st paragraph).

(ii) A.I.R. 1934 Bombay 230 (Special Bench) (Mary Geraldine Rooke v. John William Rooke) (Index note and paragraphs 1 and 2).

(iii) A.I.R. 19'35 Bombay 5 (Muncherji Cursetji Khambata v. Jessie Grant Khambata) (Page 12--2nd Paragraph) (the observations of Broomfield, J..... These propositions have not been challenged.)

(iv) 46 CWN 465 (Noor Johan Begum v. Eugene Tiscenko) (Page 468--left hand column--last paragraph and page 468--right hand column--3rd paragraph).

(v) AIR 1944 Allahabad 97 (Prem Pratap v. Jagat Pratap) (Index note (a)).

(vi) (1950) 52 BOM. L.R. 876 (Sarwar Merwan Yesdiar v. Merwan Rashid Yesdiar) (page 881--4th paragraph).

(vii) : AIR1951 Pat434 (Sayeedah Khatoon and Ors. v. The State of Bihar and Ors.) (Index note (a) and paragraphs 3 and 8) (overruled in : [1955]1SCR1259 (State of Bihar v. Kumar Amar Singh and Anr.) on a different point).

(viii) 57 CWN 778 (Special Bench) (Rosetta Evelyn Attaulla v. Justin Attaullah and Anr.) (1st Index note on page 778 and page 787--3rd paragraph) : : AIR1953 Cal530 (Index note (g) and paragraph 35).

(ix) : AIR1954 All456 (Mst. Allah Bandi and Anr. v. Govt. of Union of India and Ors.) (Index note and paragraphs 4, 5 and 6).

(x) : [1955]1SCR1259 (State of Bihar v. Kumar Amar Singh and Anr.) (Index note (a) and Paragraph 4).

(xi) AIR 1955 Nagpur 6 (Karimun Nisa and Ors. v. State Government of Madhya Pradesh and Anr.) (Index note (a) and paragraphs 7, 8 and 9).

(xii) : AIR 1957 MP1 (Naziranbai v. State) (Index note (a) and paragraph 3).

(xiii) : AIR1959 Cal348 (Mrs. Myrtle Evetya Mary Barrett v. Adrian James Benjamin Barrett) (Paragraph 4).

(xiv) (Christopher Andrew Neelakantan v. Mrs. Anne Neelakantan) (Index note (b) and paragraph 10).

(xv) : AIR1963 Guj226 (State v. Abdul Suttar Haji Ibrahim Patel) (Paragraph 18).

(xvi) AIR 1965 Jammu & Kashmir 83 (Prakash v. Mst. Shahni and Ors.) (Index note (b) and paragraphs 6, 7, 11 and 12).

(xvii) AIR 1971 Punjab and Haryana 80 (S. Teja Singh v. Smt. Satya and Ors.) (Index note and paragraphs 6, 7 and 14) (Overruled in : 1975 CriLJ52 (Smt. Satya v. Teja Singh) on a different point).

(xviii) I (1984) Divorce and Matrimonial Cases 252 (Gujarat High Court) (Nitaben v. Dhirendra Chandrakant Shukla and Anr.) Paragraph 55).

(xix) : AIR1987 Guj4 (Shrivastava Rajeshkumar Satyanarayan v. The Chairman, Selection Committee and Ors.) (Paragraph 11).

7. I have given my anxious consideration to the facts and circumstances of the present case with relation to the proposition of law propounded by the petitioner in those cases.

8. I do not really find any conflict which brings the case to the arena of Private International Law where the laws of the country of the petitioner's alleged domicile

would militate against laws in India so as to negate the claim of the opposite party for maintenance of herself and her child. I am firmly of the view that in this case the principle of Private International Law or conflict of laws is not called into play so as to oust the jurisdiction of the learned Magistrate's Court to proceed with the trial or enquiry under Section 125 read with Section 126 of the Code of Criminal Procedure.

9. Section 125 of the Code of Criminal Procedure Code can be applied irrespective of citizenship and of personal law of the petitioner husband. In : 1985 CriLJ875 commonly known as Shah Bano's case (Mohd. Ahmed Khan v. Shah Bano Begum and Ors.) at paragraph 10 of the judgment it was observed as follows : 'it shows unmistakable that Section 125 Cr.P.C. overrides personal law ; if there is any conflict between the two'. Paragraph 11 is also clinching enough in this context. The Supreme Court in this case wanted to set at rest, once for all, the question whether Section 125 would prevail over the personal law of the parties in all cases where they are in conflict.

10. In Gramophone Company of India Ltd. v. Birendra Bahadur Pandey and Ors. reported in : 1984(2)ECC142 it was decided by the, Supreme Court that the rules of International Law may be accommodate in the Municipal Law even without express legislative sanction provided they do not run into conflict with acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the Rules of International Law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an act of parliament. Municipal Law must therefore prevail in case of conflict. National Courts will endorse International Law but not if it conflicts with national law. National Courts being organs of the national state and not organs of International Law must perforce apply national law if International Law conflicts with it. But the Courts are under an obligation within legitimate limits to so interpret the Municipal Statute so as to avoid confrontation with comity of Nations or the well established principles of International Law. But if conflict is

inevitable, the latter must yield.

11. Mr. Banerjee appearing in person contents that this principle applies in respect of principles of International Law and not with regard to the principles of Private International Law. Be that as it may, the proposition is broad enough as to exclude the contention of the petitioner regarding ouster of jurisdiction of the Municipal Courts in matters of maintenance claimed by the opposite party.

12. In : (1984)ILLJ481SC Dr. Pradip Jain v. Union of India, it was held by the Supreme Court that it would be absurd to suggest that legal system varies from State to State or the legal system of a State is different from the legal system of the Union of India, merely because States within their legislative competence, have power to make laws. Concept of domicile has no relevance to the applicability to Municipal Laws, whether made by the Union of India or by the State. It would not therefore be right to say that a citizen of India is a domicile in one State or another, if that State is a part of the union of India. Though used in a different context regarding reservation of seats made by some State Governments on the basis of domicile or residential requirement within the State or on the basis of institutional preference for students who have passed qualifying examination, the observation is clear enough to rule out the contention of the petitioner that on the basis of his alleged domicile in one of the American States he can defeat the application of a Municipal Law which is of universal application all throughout India irrespective of status of husband against claim for maintenance made by the neglected or deserted wife and children.

13. In : AIR1957 Pat256 Suresh Narayan Sinha v. Ahauri Balbhadra Prosad and Ors. a Division Bench of the Patna High Court held that it is true that according to the principles of International Law, a court has no jurisdiction to entertain a Suit against a foreigner who does not permanently or temporarily reside within its jurisdiction, and who had not submitted to its jurisdiction. But if the legislature confers jurisdiction upon the Court constituted in a particular territory to entertain suit or proceeding against foreigners, where cause of action wholly or partly arises within its jurisdiction, then such Court undoubtedly has jurisdiction if the conditions provided by the law to which it is subject are fulfilled. Thus the existing Rule of

Private International Law is therefore in this regard subject to Rules of Municipal Law. In this case Sections 125 and 126 read together do not exclude a foreigner from the purview of statutory law and that being so, even if temporarily there be any conflict in the sense of Private International Law, that is ruled out so as to allow the Municipal Law to have a free play.

14. In *Mrs. Santi Singh v. Governor of Punjab and Anr.* it was held by a single Judge of the Punjab High Court that the Rules of conflict of laws or of Private International Law is adumbrated by various writers not to have any statutory force of universal application in all countries. These rules have been deduced from certain decided cases as they arose from time to time in different countries.

15. In : [1964]2SCR73 *Mst. Jagir Kaur v. Jaswant Singh* it was held by the Supreme Court, having regard to the object sought to be achieved by the statute that the meaning implicit in the words used and the construction placed by decided cases thereon, word 'resides' should be defined in the context of a 'person residing in a place' if he through choice makes it his abode permanently or even temporarily and whether a person has chosen to make a particular place his abode depends upon the facts of each case. It is visibly clear from the said decision that if a person visits a town for medical treatment or for receiving higher education, still then, even if he is not a domicile of those places; he 'resides' in those places. The Supreme Court in inimitable words summarised the object of the statute holding inter alia that the same has been engrafted for providing maintenance of wife and children and that it tends to serve a social purpose. It provides alternative forum enabling a deserted wife or a helpless child to get urgent relief and in a proceeding under that section it can be taken against husband or the father as the case may be, in a place where he resides permanently or temporarily or where he last resided in any district in India or where he happens to be at the time the proceedings are initiated. This was with reference to provision of Section 488 of Code of 1898.

16. With regard to the present Code of 1973, the law has advanced further as to confer a jurisdiction to such Courts, where the wife 'resides' and that apart, it is an admitted fact that since 1979 the petitioner husband is also living in the District of

24-Parganas and has not left for U.S.A. for all these years.

17. In the reported decision of the Supreme Court in : 1975 CriLJ52 Sm. Satya v. Teja Singh it was decided that where it is a problem of Municipal Law or of conflict of laws, every case which comes before Indian Court must be decided in accordance with the Indian Law. It is another matter that the Indian conflict of laws may require that law of foreign country shall be applied in a given situation for deciding a case which contains a 'foreign element.' Such recognition is accorded not as an act of courtesy but on consideration of justice. It is implicit in that proposition that foreign law must not be against our public policy. That however was a case of the application of a foreign judgment which was void ab initio if not voidable on ground of fraud which could not be taken as sacrosanct and of a binding character obtained against an Indian wife residing in India. Though the facts are otherwise in variance with the present case, it would not be out of place to quote a particular observation of the Supreme Court which is not devoid of context. 'We cannot therefore adopt mechanically rule of Private International Law evolved by others. These principles vary greatly and are moulded by the respective social, political and economic conditions in this country.' Taking in view the object and social purpose of Section 125 and 126 of the Code of Criminal Procedure I do hold that the objection raised by the petitioner is absolutely untenable in law and should be rejected altogether.

17. The petitioner has made a grievance that he has not been allowed to adduce evidence as regards his status as an American citizen despite his residence in India for a continuous period from 1979 onwards. Nothing prevents the petitioner from adducing such evidence if he so requires and the learned Magistrate should accord him an opportunity to do so. But that as I have indicated above does not tilt the consideration regarding exercise of proper jurisdiction in so far as the claim for maintenance made by the wife and child is concerned. It should.

18. The Rule therefore stands discharged and all interim orders stand vacated. Let proceeding before the court below be expedited. The learned Advocate for the opposite party claimed not only discharge of the Rule but also costs, but regard being had to the facts and circumstances of the case there will be no order as to

costs.

19. The petitioner submits that it is a fit case for granting certificate for leave of appeal to the Supreme Court since this case involves a substantial question of law as to the interpretation of the Sections 125 and 126 of the Code of Criminal Procedure or it is a fit one for appeal to the Supreme Court. I do not think it is a fit case for appeal to the Supreme Court in either way. The prayer is rejected.

20. The prayer for stay of proceeding before the court below is considered and rejected.

21. If an urgent certified copy of the judgment is applied for the same may be made available to the parties concerned within two weeks from the date of putting in of the necessary requisites in this behalf.

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